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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MARTIN LEE FOSTER,

Case No. 1:22-cv-01359-AWI-HBK (PC)

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Plaintiff,

FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION FOR A FAILURE TO
OBEY COURT ORDER AND PROSECUTE
ACTION

12

v.

14-DAY DEADLINE

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ROSEVILLE FBI DEPT., YUBA FBI
DEPT. SAN JOSE FBI DEBT.,

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Defendants.

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Plaintiff Martine Foster is a state prisoner proceeding pro se in this civil rights action. For the reasons set forth below, the undersigned recommends the District Court dismiss this action for Plaintiff's failure to comply with a court order and prosecute this action.

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BACKGROUND

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Plaintiff initiated this action by filing a civil rights complaint under 42 U.S.C. § 1983 on October 24, 2022. (Doc. 1). Plaintiff did not accompany the complaint with the \$402.0 filing fee or an application to proceed *in forma pauperis* under 28 U.S.C. § 1915. On November 10, 2022, the Court issued an Order directing Plaintiff to file an application to proceed *in forma pauperis* or pay the filing fee within 30 days. (Doc. 2). The Court enclosed a blank application with instructions for Plaintiff's use. (Doc. 2-1). In its November 10, 2022 Order, the Court expressly warned Plaintiff that if failed to timely comply, the undersigned would recommend that the case be dismissed for failure to prosecute and failure to obey a court order. Doc. No. 2 at 1:21-24).

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1 Plaintiff has failed to submit an application to proceed *in forma pauperis* or pay the filing fee to
2 proceed in this action and the time to do so has expired.

3 **APPLICABLE LAW AND ANALYSIS**

4 **A. Legal Standard**

5 Federal Rule of Civil Procedure 41(b) permits the court to involuntarily dismiss an action
6 when a litigant fails to prosecute an action or fails to comply with other Rules or with a court
7 order. *See Fed. R. Civ. P. 41(b); see Applied Underwriters v. Lichtenegger*, 913 F.3d 884, 889
8 (9th Cir. 2019) (citations omitted). Similarly, the Local Rules, corresponding with Federal Rule
9 of Civil Procedure 11, provide, “[f]ailure of counsel or of a party to comply with ... any order of
10 the Court may be grounds for the imposition by the Court of any and all sanctions ... within the
11 inherent power of the Court.” E.D. Cal. L.R. 110. “District courts have inherent power to control
12 their dockets” and, in exercising that power, may impose sanctions, including dismissal of an
13 action. *Thompson v. Housing Auth., City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986). A
14 court may dismiss an action based on a party’s failure to prosecute an action, obey a court order,
15 or comply with local rules. *See, e.g., Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)
16 (dismissal for failure to comply with a court order to amend a complaint); *Malone v. U.S. Postal
Service*, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for failure to comply with a court order);
17 *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to prosecute and
18 to comply with local rules). In determining whether to dismiss an action, the Court must
19 consider several factors: (1) the public’s interest in expeditious resolution of litigation; (2) the
20 Court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
21 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
22 sanctions. *Henderson*, 779 F.2d at 1423; *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988).

24 **B. Analysis**

25 The undersigned considers each of the above-stated factors and concludes dismissal is
26 warranted in this case. As to the first factor, the expeditious resolution of litigation is deemed to
27 be in the public interest, satisfying the first factor. *Yourish v. California Amplifier*, 191 F.3d 983,
28 990-91 (9th Cir. 1999). Turning to the second factor, the Court’s need to efficiently manage its

1 docket cannot be overstated. This Court has “one of the heaviest caseloads in the nation,” and
2 due to unfilled judicial vacancies, which was further exacerbated by the Covid-19 pandemic,
3 operates under a declared judicial emergency. *See Amended Standing Order in Light of Ongoing*
4 *Judicial Emergency in the Eastern District of California.* The Court’s time is better spent on its
5 other matters than needlessly consumed managing a case with a recalcitrant litigant. Because the
6 Court cannot effectively manage its docket if Plaintiff ceases litigating his case. Thus, the Court
7 finds that both the first and second factors weigh in favor of dismissal.

8 Delays inevitably have the inherent risk that evidence will become stale or witnesses’
9 memories will fade or be unavailable and can prejudice a defendant, thereby satisfying the third
10 factor. *See Sibron v. New York*, 392 U.S. 40, 57 (1968). Thus, the third factor, risk of prejudice
11 to defendant, also weighs in favor of dismissal since a presumption of injury arises from the
12 occurrence of unreasonable delay in prosecuting an action. *Anderson v. Air W.*, 542 F.2d 522, 524
13 (9th Cir. 1976). Plaintiff’s inaction amounts to an unreasonable delay in prosecuting this action,
14 weighing in favor of dismissal for a risk of prejudice to defendants.

15 Finally, the fourth factor usually weighs against dismissal because public policy favors
16 disposition on the merits. *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002). However,
17 “this factor lends little support to a party whose responsibility it is to move a case toward
18 disposition on the merits but whose conduct impedes progress in that direction,” which is the case
19 here. *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1228 (9th
20 Cir. 2006) (citation omitted). Indeed, “trial courts do not have time to waste on multiple failures
21 by aspiring litigants to follow the rules and requirements of our courts.” *Pagtalunan v. Galaza*,
22 291 F.3d 639, 644 (9th Cir. 2002) (Trott, J., concurring in affirmance of district court’s
23 involuntary dismissal with prejudice of habeas petition where petitioner failed to timely respond
24 to court order and noting “the weight of the docket-managing factor depends upon the size and
25 load of the docket, and those in the best position to know what that is are our beleaguered trial
26 judges.”).

27 Finally, the Court’s warning to a party that failure to obey the court’s order will result in
28 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;

1 *Malone*, 833 F.2d at 132-33; *Henderson*, 779 F.2d at 1424. The Court’s November 10, 2022,
2 Order expressly warned Plaintiff that his failure to comply with the Court’s order would result in
3 a recommendation for dismissal of this action. (Doc. 2 at 1:21-24). Thus, Plaintiff had adequate
4 warning that dismissal could result from his noncompliance. And the instant dismissal is a
5 dismissal *without* prejudice, which is a lesser sanction than a dismissal with prejudice, thereby
6 addressing the fifth factor.

7 After considering the factors set forth *supra* and binding case law, the undersigned
8 recommends dismissal, without prejudice, under Fed. R. Civ. P. 41 and Local Rule 110.

9 Accordingly, it is **RECOMMENDED**:

10 This action be DISMISSED without prejudice for Plaintiff's failure to obey court orders
11 and failure to prosecute.

NOTICE

13 These Findings and Recommendations will be submitted to the United States District
14 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**
15 **of the date of service** of these Findings and Recommendations, Plaintiff may file written
16 objections with the Court. The document should be captioned, “Objections to Magistrate Judge’s
17 Findings and Recommendations.” Plaintiff’s failure to file objections within the specified time
18 may result in waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
19 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Dated: December 14, 2022

Helena M. Barch-Kuchta
HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE